Office-Supreme Court, U.S.
FILED
DEC 2 8 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 854

WILLIAM H. HARRISON, KENNETH YOUTZ, WILBUR MEAD, LEWIS F. HANSON and CARL EMRICH,

Appellants

VS.

HARRY H. SCHAEFER, ADRIAN W. REYNOLDS, BURTON W. MARSTON, PATRICK H. MEENAN, DARLENE ELIOTT, RALPH A. URBIGKIT and EDWIN H. WHITEHEAD, THYRA THOMSON, as Secretary of State of the State of Wyoming, THYRA THOMSON, MINNIE A. MITCHELL and EVERETT T. COPENHAVER, as members of the Board of the State Board of Election Canvassers, and CLIFFORD P. HANSEN, as Governor of the State of Wyoming,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

JURISDICTIONAL STATEMENT

THOMAS O. MILLER
1810 Pioneer Avenue
Cheyenne, Wyoming

ARTHUR KLINE
315 American Natl. Bank Bldg.
Cheyenne, Wyoming

PAUL B. GODFREY
305 American Natl. Bank Bldg.
Cheyenne, Wyoming

HARRY B. HENDERSON
305 American Natl. Bank Bldg.
Cheyenne, Wyoming

Attorneys for Appellants

Ray F. Frey Co., Denver, Colo.

INDEX

	PAGE
Jurisdictional Statement	1
Questions Presented by Appeal	5
Statement of the Case	6
Substantiality of Grounds	11
Matters in which District Court Abused its Discretion	19
Appendix A, Opinion, November 27, 1964	A-1
Appendix B, Opinion, October 8, 1965	B-1
Appendix B(1), Judgment, October 8, 1965	B(1)-1
Appendix C, Affidavit of Keith F. Marsh	C-1
Appendix D, Excerpt from *Drew vs Scranton*	D-1

CITATIONS

Baker vs Carr, 369 U.S. 186, 7 L.ed. 2d 663, 82 S.Ct. 691 (1962)	3
Butcher vs Bloom, 415 Pa. 438, 203 A2d 556 (1964)	15
Dorsey vs Fortson, 228 F. Supp. 259 (1964)	13
Drew vs Scranton, 229 F. Supp. 310 (1964)	15
Fortson vs Dorsey, 379 U.S. 433, 13 L.ed. 2d 401, 85 S.Ct. 498 (1965)	3, 13, 15
Gray vs Sanders, 372 U.S. 368, 9 L.ed. 2d 821, 83 S.Ct. 801 (1963)	3, 14
Lucas vs Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 12 L.ed. 2d 632, 84 S.Ct. 1472 (1964)	3, 11, 12, 16
Lucas vs Forty-Fourth General Assembly of Colorado, 379 U.S. 693, 13 L. ed. 2d 699, 85 S. Ct. 715 (1965)	12
Reynolds vs Sims, 377 U.S. 533, 12 L.ed. 2d 506, 84 S.Ct. 1362 (1964)	3, 17
Schaefer vs Thompson, 240 F.Supp. 247 (1964)	2, 16
White vs Anderson, 394 P2d 333 (1964)	12

STATUTES

	PAGE
28 U.S.C. 1253	2
28 U.S.C. 1343	3
28 U.S.C. 2201-2202	3
42 U.S.C., 1983 & 1988	3
Ch. 22, Session Laws of Wyoming, 1963	4

CONSTITUTIONAL PROVISIONS

Sec. 3, Article III, *Wyoming Constitution*	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO.....

WILLIAM H. HARRISON, KENNETH YOUTZ, WILBUR MEAD, LEWIS F. HANSON and CARL EMRICH,

Appellants

VS.

HARRY H. SCHAEFER, ADRIAN W. REYNOLDS, BURTON W. MARSTON, PATRICK H. MEENAN, DARLENE ELIOTT, RALPH A. URBIGKIT and EDWIN H. WHITEHEAD, THYRA THOMSON, as Secretary of State of the State of Wyoming, THYRA THOMSON, MINNIE A. MITCHELL and EVERETT T. COPENHAVER, as members of the Board of the State Board of Election Canvassers, and CLIFFORD P. HANSEN, as Governor of the State of Wyoming,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

JURISDICTIONAL STATEMENT

COME NOW, the appellants above named, by their counsel, and, under and in pursuance of Rule 15 of the Rules of the Supreme Court, make the following jurisdictional statement.

1. (a) This appeal arises from and upon the Judg-

ment of The United States District Court for the District of Wyoming, sitting as a Court of three Judges properly convoked under the statutes in such cases applicable, which Opinion and Judgment were rendered and entered October 8, 1965, and which is not yet reported. Theretofore, on November 27, 1964, the same Court of three Judges, in the same action, had rendered an Opinion and Judgment, which appears reported in 240 F. Supp. 247 (1964), under the title, *Schaefer vs. Thomson*. The first Opinion appears in Appendix "A," hereinafter, and the Opinion of the Court herein appealed from, together with Appendix "A" and Appendix "B" thereto, together with the Judgment of the Court appear hereinafter as Appendix "B" and "B(1)," respectively.

JURISDICTION

1. (b) The grounds upon which the jurisdiction of this Honorable Court as invoked are as follows:

(i) This is a proceeding on appeal from a final Judgment of a three-Judge Court, involving the granting of injunctive and other equitable relief with reference to the alleged unconstitutionality of Statutes and constitutional provisions of the State of Wyoming, and the appeal is taken under and in pursuance of Section 1253, 28 U.S.C. as follows:

"Section 1253. Direct appeals from decisions of three-Judge Courts. Except as otherwise provided by law, any party may appeal to the Supreme Court from an Order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of three Judges."

The action is one which directly involves the question of legislative apportionment, and the constitutional validity, under the Fourteenth Amendment to the Constitution of The United States, of the decision of the three-Judge Court entered on October 8, 1965. The effect of the decree of the Court was to apportion

the Senate of the State of Wyoming and to create legislative districts. The matter is essentially one of first impression and involves the question of invidious discrimination and denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of The United States of America. The suit was originally brought under 28 U.S.C. Section 1343 (3) & (4), 28 U.S.C. Section 2201-2202, 42 U.S.C. Section 1983 & Section 1988.

(ii) The Judgment sought to be reviewed was filed and entered on October 8, 1965 in the District Court for the District of Wyoming. A rehearing was not requested by any of the parties. The time of appeal is believed to be governed by 28 U.S.C. Section 2101, which provides that the appeal shall be taken within thirty days after entry of the Final Order, Judgment or Decree. The Notice of Appeal was filed in the United States District Court for the District of Wyoming on November 4, 1965.

(iii) It is believed that Section 1253 of Title 28, United States Code, confers jurisdiction of this appeal.

(iv) Cases believed to sustain the jurisdiction of this Court are as follows:

Baker vs Carr, 369 U.S. 186, 7 L.ed 2nd 663, 82 S.Ct. 691 (1962)

Lucas vs Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 12 L.ed. 2d 632, 84 S.Ct. 1472 (1964)

Reynolds vs Sims, 377 U.S. 533, 12 L.ed. 2d 506, 84 S.Ct. 1362 (1964)

Gray vs Sanders, 372 U.S. 368, 9 L.ed. 2d 821, 83 S.Ct. 801 (1963)

Fortson vs Dorsey, 379 U.S. 433, 13 L.ed. 2d 401, 85 S.Ct. 498 (1965)

The appellants believe that the appeal falls clearly within the language set forth by the United States Supreme Court in *Fortson vs Dorsey*, as follows:

"It might well be that, designedly or otherwise, a multi-

member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize and cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated, it will be time enough to consider whether the system still passes constitutional muster." (379 U.S. .....; 13 L.ed. 2d 405, 85 S.Ct. 501)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

(v) The provisions of the Constitution of the State of Wyoming and the Statutes of the State of Wyoming which are pertinent to the within matter are as follows:

Section 3, Article III, *Wyoming Constitution:*

"Each county shall constitute a senatorial and representative district; the Senate and House of Representatives shall be composed of members elected by the legal voters of the counties respectively, every two (2) years. They shall be apportioned among the said counties as nearly as may be according to the number of their inhabitants. Each county shall have at least one Senator and one Representative; but at no time shall the number of members of the House of Representatives be less than twice nor greater than three times the number of members of the Senate."

Chapter 22 of the *Session Laws of Wyoming*, 1963:

"Section 1. That Section 28-9, Wyoming Statutes, 1957, be amended and re-enacted to read as follows:

Each organized county shall have one Senator for every thirty-thousand (30,000) inhabitants, or major portion thereof, as shown by the enumeration of such inhabitants in the Federal Census of the year one-thousand nine-hundred sixty (1960).

Section 2. That Section 28-10, Wyoming Statutes, 1957, be amended and re-enacted to read as follows:

Each organized county shall have one Representative for each fifty-four hundred (5,400) inhabitants, or major portion thereof, as shown by the enumeration of such inhabitants in the Federal Census of the year one-thousand nine-hundred sixty (1960)."

QUESTIONS PRESENTED

1. (c) The following questions are presented by this appeal:

(i) Whether the Judgment of the District Court created an invidious discrimination and violated the Equal Protection Clause of the Constitution of The United States of America in that it failed to subdivide senatorial districts in the State of Wyoming which have more than one Senator elected at large by the voters.

(ii) Whether the Order of the District Court created an invidious discrimination and violated the Equal Protection Clause of the Constitution of The United States of America in that it required voters of certain senatorial districts to vote for more than one Senator while voters of other districts are required to vote for only one Senator.

(iii) Whether the Order of the Court created an invidious discrimination and violated the Equal Protection Clause of the Constitution of The United States of America in that it will result in certain geographic areas within senatorial districts being totally or partially unrepresented by Senators in the Legislature of the State of Wyoming.

(iv) Whether the Court created an invidious discrimination and violated the Constitution of The United States of America by subdividing one county and joining other counties together into senatorial districts in order to obtain Senators elected from districts of relatively equal population, while failing to subdivide relatively populous districts, so that all of the voters in said counties might have equal representation in the Wyoming Legislature.

(v) Whether the failure of the Court to subdistrict certain senatorial districts created a *federal question* because of invidious discrimination in violation of the Equal Protection Clause of the Constitution of The United States of America which would require action by the Federal Court rather than the Courts of the State of Wyoming.

The question may be further expressed as follows:

(i) Whether the United States District Court was compelled to create equal single-member districts for the entire State of Wyoming in order to grant equal protection of the laws to the citizens of the State because of the peculiar and unique geographical and population characteristics of the state.

(ii) Whether the United States District Court was compelled to properly subdivide all senatorial voting districts in order to create single-member districts once it had subdivided one county and joined other counties in order to create single-member districts.

(iii) Whether the United States District Court could properly allow a scheme of apportionment to stand which was based upon an entirely different premise for the Senate and House of Representatives.

STATEMENT

1. (d) The facts material to the consideration of the questions presented are as follows:

(i) A proper examination of the facts involved in the appeal requires an understanding of the unique geographic and political characteristics of the State of Wyoming. By comparison with most states, Wyoming consists of a sparsely populated area which is dominated by a few relatively large towns and cities located a great distance apart. The counties in the state mostly have one relatively large city or town and several small towns or villages, which villages have a population of less than 500 people. These small towns or villages are frequently many miles distant from the large city or town which is the county seat of the county or voting district. Often, the town or village is such a distance from the dominant city or town that it has completely distinct and different economic and political characteristics. On the other hand, there are a few counties which are both small in area and population and have but one or two small towns or villages. The population of these small counties is basically homogeneous. The Order of the District Court ap-

pealed from created single-member districts in the small counties, but failed to create single-member districts in the large counties where the population is not homogeneous.

Laramie County, Wyoming, which is the largest county in the state, and which surrounds Cheyenne, tends to have the greatest difference or disparity in economic and political characteristics. Pine Bluffs, Wyoming, which is a town or village of approximately 1,200 people, is located some 45 miles distant from Cheyenne, Wyoming. While Cheyenne has many of the characteristics of a large city, Pine Bluffs is essentially a rural or country town. The great preponderance of voting strength in Cheyenne results in a situation in Laramie County in which towns such as Pine Bluffs do not receive representation, and the great distance of such towns from Cheyenne results in little consideration of the problems of the town.

The inherent discrimination created by multi-member districts in the State of Wyoming became grossly apparent with the judicial reapportionment of the state in the Judgment of October 8, 1965. While Laramie County previously had two Senators and six Representatives, it now has five Senators and eleven Representatives, which fact vests even more control in th City of Cheyenne to the exclusion of the rural and country towns. Thus, the question presented in this appeal is one that appears to be unique to the arid western states and one which must have the attention of The United States Supreme Court if the inherent discrimination now existing, and the denial of the equal protection of the rights of the citizens under the Fourteenth Amendment to the Constitution of The United States, is to be prevented.

(ii) The case was originally instituted by the appellees, plaintiffs below, in 1963. The original action attacked the apportionment of the Wyoming Legislature as it existed in 1963. The Wyoming Constitution, hereinbefore quoted, clearly provided that the House of Representatives should be apportioned among the counties as nearly as possible according to the number of their inhabitants. The Wyoming Legislature had

not been apportioned for many years and the plaintiffs contended that the Legislature was improperly apportioned and joined the Governor and other state officials as defendants in the action.

The Wyoming Legislature had been apportioned to some extent in the 1963 Legislative Session and the Apportionment Statute of 1963 has been previously cited herein. After a hearing on the question of apportionment, a decision was entered by the three-Judge District Court on November 27, 1964, which is attached hereto as Appendix "A." The Court held, in effect, that the Apportionment Act of 1963 was constitutional as it pertained to the House of Representatives, but that the said Act was unconstitutional as it pertained to the Senate of the State of Wyoming. However, the Court held that it would delay any action with regard to the Senate until the 1965 Session of the Wyoming Legislature upon the premise that the Legislature would take action to reapportion the Senate. The three-Judge Court removed certain restrictions upon the Legislature by holding that Section 3, Article III of the Wyoming Constitution, which constitutes each county an election district and requires that each county be represented by at least one Senator, is ineffective and need not be considered in any reapportionment scheme.

The 1965 Session of the Wyoming Legislature adjourned at the termination of its normal forty-day session without reapportioning the Senate. It then became obvious that the three-Judge District Court would have to take action to reapportion the Senate by judicial decree. At that time, the appellants herein intervened in said pending action by Stipulation of all parties and approval of the Court. The District Court then made it known to the parties that it would receive evidence and hold a hearing on the question of the apportionment of the Wyoming Senate.

(iii) The appellants herein do not basically quarrel with the *fact* that the Wyoming Senate was reapportioned by judicial decree. They do quarrel, however, with the *manner* in which the Wyoming Legislature was reapportioned.

The Complaint in Intervention filed by the appellants was based essentially upon the proposition that failure to sub-district multi-member voting districts would result in an invidious discrimination and the denial of the equal protection of the laws to the citizens of Wyoming under the Fourteenth Amendment to the Constitution of The United States of America. The Complaint was basically founded in the recognition of the unique geographic and population problems of Wyoming hereinbefore discussed. The basic allegations of the Complaint were as follows:

1. Laramie County, Wyoming, had a 1960 Federal Census population of 60,149 people, of whom 43,505 resided within the corporate limits of the City of Cheyenne, and the remainder resided outside of the corporate limits. No Representative has been elected to the Wyoming Legislature from outside the corporate limits since 1952. Therefore, the electors residing outside of the corporate limits have been deprived of representation since the year 1952. Consequently, approximately one-third of the residents of the county are, in effect, deprived of representation by the plurality principle.

2. The City of Cheyenne is geographically divided by certain characteristics, such as the Union Pacific Railroad tracks, into distinct areas. Certain of these areas have not had representation in the Legislature for many years and most certainly for over ten years.

3. Under the present system, there is obviously a concentration of Senators and Representatives from certain small areas within the city limits. For example, both of the incumbent Senators from the county-wide district reside in one precinct in which only 395 votes were cast in the 1964 general election. This fact is typical of a condition which has existed for many years.

4. The practical effect of the multi-member system in Laramie County is to cancel out and destroy the voting strength of certain economic and political interests, which in turn results in the total and absolute cancellation of the voting rights of these segments. The application of the plurality principle to sparsely

populated western states results in a prima facie invidious discrimination.

5. The resultant condition in which towns, villages and rural residents are compelled to be represented by persons of a different economic background who reside forty or fifty miles distant, is a prima facie denial of the equal protection of the laws under the Fourteenth Amendment to the Constitution of The United States of America.

A pre-trial conference on the matter of the apportionment of the Wyoming Senate was held on August 31, 1965. At that time exhibits were offered by all parties. Most of these exhibits consisted of plans for apportionment of the State of Wyoming and Laramie County. At the termination of the pre-trial conference, it was agreed by all parties that no additional evidence would be necessary for disposition of the case and that the District Court could decide the matter without further hearing upon the record made at the pre-trial conference. It was also agreed that the affidavits of certain witnesses who would have appeared at the regular trial could be received as evidence. The affidavit of Keith F. Marsh, a witness for the appellants, is attached hereto as Appendix "C." An Order on the pre-trial conference was entered on September 1, 1965.

(iv) The appellants believe that the District Court erred in not completely discharging its duty in the reapportionment scheme. Although there was evidence to support the position of the appellants, as indicated from Appendix "C," the Court took the position that it could not subdivide voting districts because The United States Supreme Court had not ruled upon the subject. The appellants asserted that the obvious and inherent discrimination existing in the multi-member or plurality system required that the Court take action regardless of whether there was any previous authority to sustain the position of the appellants. However, the District Court refused to rule upon the evidence of the appellants and merely relied upon the absence of authority. The appellants believe that it was incumbent upon the Court to act when

there was obvious discrimination and that the Court could not properly ignore the facts of the case when entering a judicial reapportionment decree.

(v) The federal questions sought to be reviewed herein were raised in the pleadings of the case and in the contentions of the appellants submitted at the pretrial conference. As previously stated, the contentions of the appellants were disposed of on the basis that there was no authority to support the asserted position even though there might be discrimination.

THE QUESTIONS ARE SUBSTANTIAL

1. (e) The questions presented are so substantial as to require Briefs on the merits and consideration because:

This appeal involves the obligation of the Federal Court to completely discharge its duties to all parties and litigants once it has entered the field of reapportionment. Laramie County, Wyoming, will have eleven Representatives and five Senators under the reapportionment scheme formulated by The United States District Court. The problem inherent in such a situation was recognized by the Supreme Court in *Lucas vs Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 12 L.ed. 2d 632, 84 S.Ct. 1472, when it commented upon the fact that Denver voters were required to vote for eight Senators and seventen Representatives. The problem of the plurality principle has probably not received the attention it deserves because of the fact that most populous states have long recognized the necessity of single-member districts. Therefore, when the more populous states were ordered to reapportion by their respective District Courts, they readily adopted a scheme which provided for single-member districts or perhaps multi-member districts in homogeneous areas. In any event, the problem has been distinctly recognized in at least three states. The approach taken in these three states or the results obtained have in many cases led to confusion concerning the constitutional aspects of the plurality principle.

This confusion, of itself, should require further consideration of the matter by the Supreme Court.

The contention of counsel for the appellees, plaintiffs below, is that The United States Supreme Court has directly ruled that single-member districts are not necessary regardless of the evidence of discrimination. Appellants believe that this is not the case and that the problem should be resolved by a direct ruling of The United States Supreme Court. The problem arose with *Lucas vs Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 12 L.ed. 2d 632, 84 S.Ct. 1472, in which the Supreme Court ruled that the apportionment of Colorado was unconstitutional. Thereafter, in *White vs Anderson*, 394 P2d 333 (1964), the Supreme Court of the State of Colorado considered the unique provision of the Colorado Constitution which provided that no county shall be divided in the formation of senatorial or representative districts. The Colorado Supreme Court ruled that any attempted sub-districting of voting districts would be unconstitutional. This decision was obviously based upon the peculiar provision in the Colorado Constitution and did not consider the question of whether or not such a provision must fall if multi-member districts result in the creation of a federal question. The case did point up the fact that the Legislature of Colorado recognized the necessity of single-member districts in large counties. Subsequently, in a further ruling in *Lucas vs Forty-Fourth General Assembly of Colorado*, 379 U.S. 693, 13 L.ed. 2d 699, 85 S.Ct. 715, the United States Supreme Court held that the United States District Court for Colorado must take cognizance of the decision of the Supreme Court of Colorado in *White vs Anderson*, 394 P 2d 333 (1964). The decision made no mention of the recourse open to the Federal District Court in the event that the decision in *White vs Anderson* resulted in the creation of a federal question through denial of the equal protection of the laws under the Constitution of The United States of America.

However, some confusion has arisen concerning subdistricting as a result of the decision.

Another case which has led to some confusion is *Dorsey vs Fortson*, 228 F. Supp. 259 (1964). The Federal District Court held that the Georgia statute resulted in discrimination because it afforded different treatment to voters in senatorial districts. The case was decided upon a Motion for Summary Judgment without taking evidence. Thereafter, in *Fortson vs Dorsey*, 379 U.S. 433, 13 L.ed. 2d 401, 85 S.Ct. 498, The United States Supreme Court reversed the Federal District Court. In so ruling, the Supreme Court stated:

> "We treat the question as presented in that context, and our opinion is not to be understood to say that in all instances or under all circumstances such a system as Georgia has will comport with the dictates of the Equal Protection Clause. It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated, it will be time enough to consider whether the system still passes constitutional muster. This question, however, is not presented by the record before us."

Thus, the Supreme Court reserved judgment upon a situation such as exists in Wyoming. It is also important to consider that Justice Brennan noted that it is not accurate to treat a Senator from a multi-district county as representative of only a district within the county where he resides. The Justice stated:

> "Each district's Senator must be a resident of that district, but since his tenure depends upon the county-wide electorate, he must be vigilant to serve the interests of all the people in the county, and not merely those people in his home district; thus in fact he is the county's and not merely the district's Senator."

While the appellants have no knowledge of the situa-

tion in Georgia, they respectfully submit that the premise upon which *Fortson vs Dorsey* was decided is not valid in Wyoming. If the voters of the dominant cities consistently deprive substantial rural areas of representation, the premise that a representative will be vigilant because his tenure depends upon his vigilance in serving all interests is not substantiated by the evidence. It should be noted here that the reapportionment scheme adopted by the Federal Court in Wyoming results in a situation such as exists in Georgia in that several counties are joined to make one voting district. Contrary to the situation in the Georgia case, the appellants in the present appeal have produced evidence of the existence of discrimination. As Justice Douglas pointed out in *Fortson vs Dorsey*, the "foreign vote" aspect of joining counties results in an invidious discrimination, the test of unequal protection under the Fourteenth Amendment. The quotation of Justice Douglas from *Gray vs Sanders* 372 U.S. 368, 379, 9 L.ed. 2d 821, 829, 83 S.Ct. 801, is extremely pertinent in the present case:

> "Once a geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote — whatever their race, whatever their sex, *whatever their occupation, whatever their income, and wherever their home may be in the geographical unit.* This is required by the Equal Protection Clause of the Fourteenth Amendment." (*emphasis supplied*)

Thus, the Supreme Court has previously held that the geographical and occupational characteristics of the electorate must be considered in order to guarantee equal protection. However, the decision of The United States Supreme Court in *Fortson vs Dorsey* has led to some confusion. Appellants believe that the proper interpretation of the decision is merely that the District Court could not properly enter a Summary Judgment without taking evidence on the issues involved.

The third case which has resulted in some confusion

is *Drew vs Scranton*, 229 F.Supp. 310 (1964). The three-Judge District Court held that multi-member districts created *prima facie* invidious discrimination. Beginning at Page 326 of the Opinion may be found an excellent discussion of the discriminatory aspects of a situation such as presently exists in Wyoming, under the Decree now appealed. Appellants believe that the dicta of the Court is so pertinent that it is abstracted in Appendix "D." Thereafter, in *Fortson vs Dorsey*, 379 U.S. 433, 13 L.ed. 2d 401, 85 S.Ct. 498, The United States Supreme Court vacated the Judgment of the District Court and remanded the cause for further consideration in the light of the surpevening decision of the Supreme Court of Pennsylvania in *Butcher vs Bloom*, 415 Pa. 438, 203 A2d 556 (Sept. 29, 1964). Appellants believe that the Supreme Court in *Scranton vs Drew* merely held that when the State Courts have taken jurisdiction, the Federal District Courts must recognize that fact. However, the fact is that in the present appeal confusion has arisen over the reversal of the decision of a three-Judge District Court in another state, in which decision sub-districting was held to be mandatory under the Equal Protection Clause. In the present appeal, there is no complication concerning jurisdiction assumed by a State Court. Furthermore, in *Butcher vs Bloom*, 415 Pa. 438, 203 A2d 556, the Supreme Court of Pennsylvania reached much the same conclusion as the Federal District Court in *Scranton vs Drew*. Justice Roberts stated at Page 573:

> "In the light of constitutional pitfalls inherent in such a districting scheme, it would be more prudent to approach the matter of apportionment by setting up single-member districts unless valid and compelling reasons exist which require the creation of some multi-member districts."

Furthermore, in his concurring opinion, Chief Justice Bell, in effect, instructed the Pennsylvania Legislature that any new Reapportionment Act should provide for single-member districts. Thus, both the State and Federal Courts

in Pennsylvania saw fit to emphasize the advantages of single-member districts and condemned a situation in which counties are combined in unequal voting districts. Appellants have no knowledge of what the final outcome will be in Pennsylvania, but it is rather certain that the result eventually will be single-member districts. However, because of the fact that the decision of the Pennsylvania Federal District Court was reversed on other grounds, confusion exists in the area of the constitutionality of multi-member districts.

An additional constitutional problem results from the manner in which the decision of the District Court in the present case was reached. The District Court upheld the apportionment of the House of Representatives as passed in the 1963 Session of the Legislature. This Act, hereinbefore quoted, followed the Wyoming Constitution and treated each county as a voting district. Therefore, in the House of Representatives, each county remains a voting district, no two counties are joined, and no county is split and joined with other counties. On the other hand, in regard to the Wyoming Senate, the District Court joined Johnson and Campbell Counties, Cook and Weston Counties, Converse and Niobrara Counties, Teton, Lincoln and Sublette Counties, and joined the south one-half of Lincoln County with Uinta County. Thus, the apportionment schemes for the House of Representatives and the Senate were arrived at on an entirely different basis. The consideration of one House separate from the other seems to be contrary to the ruling of The United States Supreme Court in *Lucas vs Forty-Fourth General Assembly of Colorado.* The District Court approved a factor of 5,400 inhabitants per representative for the House of Representatives in *Schaefer vs Thompson,* 240 F. Supp. 247, while allocating a factor of 11,500 citizens per Senator in the present case. The ratios are obviously different between the House of Representatives and the Senate and were not considered simultaneously and upon the same factors. For example,

the House of Representatives is apportioned on the premise that the Wyoming Constitution must be followed, while the Senate is apportioned on the premise that the Wyoming Constitution may be ignored.

The ratio established in the present case is 2.08 to 1. While the appellants realize that the application of a close ratio is many times difficult, they also submit that such a problem can be easily corrected by the use of single-member districts. Without going into great detail, similar ratios have been criticized in other cases. The Court was not without evidence on the subject and defendants' Exhibit "A," submitted by the Attorney General of the State of Wyoming, contained a plan, which with some amendments, would have eliminated almost all disparity between voting districts.

Disregarding the jurisdictional problems raised by the Pennsylvania, Colorado and Georgia cases, the present state of affairs is that three Federal Districts Courts, composed of both Justices of the Circuit Court and District Court Judges, have recognized the necessity of single-member districts. In effect, this results in conflicting decisions between different circuits. This bare fact, alone, would ordinarily necessitate consideration by the Supreme Court of the question involved if the cases had been decided by Circuit Courts. The composition of a three-Judge District Court, and the appellate procedure therefrom, results in an almost identical situation.

The question involved in the appeal should not be mistakenly construed as involving the weight to be afforded the vote of diverse geographic areas. Rather, the question concerns the total diffusion of the vote of geographic areas. Appellants believe that the appeal falls clearly within the carefully worded guidelines of *Reynolds vs Sims*, 377 U.S. 533, 12 L.ed. 2d 506, 84 S.Ct. 1362. Although the lower Court failed to consider the evidence of discrimination in Laramie County, the following language of Chief Justice

Warren appears to clearly dictate consideration of the present appeal:

> "A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. * * * The Equal Protection Clause demands no less than substantially equal state legislature representation of all citizens, *of all places* as well as of all races." (*emphasis supplied*)
>
> * * *
>
> "* * * Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens being in other parts of the State." (377 U.S. 567, 12 L.ed. 2d 531, 84 S.Ct. 1384)

In Wyoming, the voters in certain areas will continue to have their votes reflected in the Legislature in much the same manner as existed prior to reapportionment. These are the areas where county units were maintained as voting districts. On the other hand, voters in many areas will have their Senators and Representatives chosen on an entirely different basis and will have their vote cancelled and submerged by dominant political subdivisions. This result constitutes the very prima facie discrimination Chief Justice Warren envisioned in *Reynolds vs Sims*. While the granting of votes to trees and pastures is to be constitutionally condemned, equal condemnation should befall a reapportionment scheme that cancels out the voting strength of entire areas. The fact that such a result constitutes discrimination under the Equal Protection Clause is clearly established in *Reynolds vs Sims* and other recent cases. Therefore, the questions raised herein are of such magnitude as to warrant the consideration of the Supreme Court.

1. (f) In addition to the fact that the apportionment scheme adopted by the District Court has resulted in invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of The

United States of America, the District Court abused its discretion in the following manner:

(i) The District Court refused to consider evidence on the question of discrimination and decided the question solely upon an alleged absence of authority.

(ii) The District Court did not consider the apportionment plan for the House of Representatives and the Senate of the State of Wyoming on the same basis and approved a plan recognizing the integrity of county voting districts for the House of Representatives while promulgating a plan which sub-districted one county and combined other counties for the Senate, which action resulted in an unnecessary ratio.

(iii) The Court erred in permitting the total and complete cancelling out of the voting rights of geographical areas and economic interests within voting districts as evidenced by the exhibits of the parties.

1. (g) It is respectfully submitted, therefore, that The United States Supreme Court has jurisdiction of this appeal and that the questions presented are substantial and urgent and should be heard by the Supreme Court.

Respectfully submitted,

THOMAS O. MILLER
1810 Pioneer Avenue
Cheyenne, Wyoming

PAUL B. GODFREY
305 American National Bank Building
Cheyenne, Wyoming

ARTHUR KLINE
315 American National Bank Building
Cheyenne, Wyoming

HARRY B. HENDERSON
305 American National Bank Building
Cheyenne, Wyoming

Attorneys for Appellants

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

HARRY H. SCHAEFER, ADRIAN W. REYNOLDS, BURTON W. MARSTON, PATRICK H. MEENAN, DARLENE ELLIOT, RALPH A. URBIGKIT, and EDWIN H. WHITEHEAD,
Plaintiffs

vs.

THYRA THOMSON, as Secretary of State of the State of Wyoming, THYRA THOMSON, MINNIE A. MITCHELL and EVERETT T. COPENHAVER, as members of the Board of the State Board of Election Canvassers, and CLIFFORD P. HANSEN, as Governor of the State of Wyoming,
Defendants

No. 4717 CIVIL

A. G. McClintock, Walter C. Urbigkit, Jr., and Maxwell E. Osborn, all of Cheyenne, Wyoming, Attorneys for Plaintiffs.

John F. Raper, Attorney General of the State of Wyoming, and Dean W. Borthwick, Deputy Attorney General of the State of Wyoming, both of Cheyenne, Wyoming, Attorneys for Defendants.

Before JOHN C. PICKETT, United States Circuit Judge; EWING T. KERR, United States District Judge; and FRED DAUGHERTY, United States District Judge.

PICKETT, Circuit Judge.

Plaintiffs, as citizens and voters of the six most populous counties of the State of Wyoming, brought this action seeking to restrain and enjoin the defendants, who are state officers charged with conducting elections under state laws[1], from proceeding in the 1964 primary and general elections under Chapter 22 of the Session Laws of Wyoming, 1963, relating to the election of representatives to the Wyoming State legislature. It is alleged that this statute is unconstitutional and void because the representation provided for wholly fails to result in a state senate and house of representatives apportioned among the several counties of the state as nearly as may be, according to their inhabitants, as required by the Wyoming Constitution, and deprives them and other similarly situated of the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.[2]

Applicable provisions of the Wyoming Constitution are as follows:

> "§37, Article 1: *Constitution of United States supreme law of land.*—The State of Wyoming is an inseparable part of the federal union, and the constitution of the United States is the supreme law of the land."

---

[1]Thyra Thomson is Secretary of State, whose duty it is to prepare and submit to each county the names of persons therefrom who have qualified under Wyoming law as candidates for election to the state legislature, and who, along with the Governor, State Treasurer and State Auditor, constitute the State Board of Election Canvassers.

[2]As examples of the resulting disparities, the complaint alleges: "The population ratio in Laramie County is one senator per 30,075 inhabitants and one representative per 5,468 inhabitants; in Fremont County one senator per 26,168 inhabitants and one representative per 5,234 inhabitants; in Natrona County one senator per 24,812 inhabitants and one representative per 5,515 inhabitants; in Weston County one senator and one representative per 7,929 inhabitants; in Uinta County one senator and one representative per 7,484 inhabitants. On the other hand, the population ratio in Teton County is one senator and one representative per 3,062 inhabitants; in Niobrara County one senator and one representative per 3,750 inhabitants; in Sublette County one senator and one representative per 3,778 inhabitants."

"§24, Article 21: *State part of United States.*—The State of Wyoming is an inseparable part of the federal union and the constitution of the United States is the supreme law of the land."

"§3, Article 3: *Legislative apportionment.*—Each county shall constitute a senatorial and representative district; the senate and house of representatives shall be composed of members elected by the legal voters of the counties respectively, every two (2) years. They shall be apportioned among the said counties as nearly as may be according to the number of their inhabitants. Each county shall have at least one senator and one representative; but at no time shall the number of members of the house of representatives be less than twice nor greater than three times the number of members of the senate."

"§48, Article 3: *State census.*—The legislature shall provide by law for an enumeration of the inhabitants of the state if the year 1895, and every tenth year thereafter, and at the session next following such enumeration, and also at the session next following an enumeration made by authority of the United States, shall revise and adjust the apportionment for senators and representatives, on the basis of such enumeration according to ratios to be fixed by law."

The pertinent provisions of Chapter 22, as it relates to the apportionment of the Wyoming senate and house of representatives in Wyoming's bicameral legislature, reads:

"Section 1. That Section 28-9, Wyoming Statutes, 1957, be amended and re-enacted to read as follows:

Each organized county shall have one senator for every thirty thousand (30,000) inhabitants, or major portion thereof, as shown by the enumeration of such inhabitants in the federal census of the year one thousand nine hundred sixty (1960)."

"Section 2. That Section 28-10, Wyoming Statutes, 1957, be amended and re-enacted to read as follows:

Each organized county shall have one representative for each fifty-four hundred (5,400) inhabitants,

> or major portion thereof, as shown by the enumeration of such inhabitants in the federal census of the year one thousand nine hundred sixty (1960)."

Applying the formula provided for in these sections, the existing house of representatives was increased by five members and the senate diminished by two.[3]

Final disposition of this case has been delayed because of uncertainty in the law and the Court's announcement that no action would be taken which would interfere with the 1964 election. By a series of recent decisions of the Supreme Court of the United States, the law controlling the disposition of this case is now settled. The jurisdiction

---

[3]Although the Wyoming Constitution provides that the legislature shall periodically reapportion, revise and adjust the apportionment for the senate and house of representatives, there has been no reapportionment since 1933. The 1933 apportionment act created a house of representatives composed of 56 members and the senate of 27 members, with the counties of Laramie, Natrona, Sheridan and Sweetwater having 2 senators each. Under Chapter 22, only Laramie and Natrona counties qualify for two senators. The 1960 United States census gave the population of Wyoming as 329,646. The following table sets forth the population of each of the 23 counties in Wyoming, together with the number of representatives and senators that each is entitled to by application of population divisors provided for in the 1963 apportionment statute:

County	Population	Senate	House
Laramie	60,149	2	11
Natrona	49,623	2	9
Fremont	26,168	1	5
Albany	21,290	1	4
Sheridan	18,989	1	4
Sweetwater	17,920	1	3
Park	16,874	1	3
Carbon	14,937	1	3
Goshen	11,941	1	2
Big Horn	11,898	1	2
Lincoln	9,018	1	2
Washakie	8,883	1	2
Weston	7,929	1	1
Uinta	7,484	1	1
Platte	7,195	1	1
Converse	6,366	1	1
Hot Springs	6,365	1	1
Campbell	5,861	1	1
Johnson	5,475	1	1
Crook	4,691	1	1
Sublette	3,778	1	1
Niobrara	3,750	1	1
Teton	3,062	1	1
	329,646	25	61

of the federal courts to grant relief upon allegations which show an invidious discrimination and a substantial disparity in representation in state legislatures is no longer open to question. Furthermore, it is now acknowledged that the equal protection clause of the Fourteenth Amendment to the Constitution of the United States requires that both houses of a bicameral state legislature be apportioned substantially on a population basis. However, mathematical exactness is not required, "So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy * * *." Reynolds v. Sims, 377 U.S. 533, 579. The foregoing rules are applicable regardless of whether the scheme for representation in either house of a bicameral state legislature results from statutory or constitutional provisions.[4] Baker v. Carr, 369 U.S. 186; Reynolds v. Sims, supra; W.M.C.A., Inc. v. Lamenzo, 377 U.S. 633; Maryland Committee v. Tawes, Governor, 377 U.S. 656; Davis v. Mann, 377 U.S. 678; Roman v. Sincock, 377 U.S. 695; Lucas v. Colorado, 377 U.S. 713; Moss v. Burkhart, D.C. W.D. Okl., 220 F. Supp. 149, affirmed sub. nom. Williams v. Moss, 378 U.S. 558.

Chapter 22, Session Laws of Wyoming, 1963, fixes the basic unit for representation of the different counties in the Wyoming house of representatives at one representative for each 5400 inhabitants, or major portion thereof. It will be noted that this formula creates a situation whereby the four smallest counties in the state have some advantage in their representation in the house, and some disadvantage to other counties, particularly those having

---

[4]In Reynolds v. Sims, 377 U.S. 533, 584, the court said: "Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible. But it is also quite clear that a state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements. When there is an unavoidable conflict between the Federal and a State constitution, the Supremacy Clause of course controls."

more than 5400 inhabitants and less than the number necessary to qualify for two representatives. It is not seriously contended, however, that this disparity creates an invidious discrimination or violation of the equal protection clause of the Fourteenth Amendment. The court is satisfied that this divergence from a strict population standard is the result of an honest attempt, based on legitimate considerations, to effectuate a rational and practical policy for the house of representatives under conditions as they exist in Wyoming. For example, Laramie, Natrona, Fremont and Albany, the four largest counties in the state, have slightly less than 50% of the state's population. The total representation in the house from these counties is 29 of the 61 members. Conversely, the four smallest counties, with approximately 5% of the total population, have a representation of 4.

The principal thrust of plaintiff's complaint and argument is directed at the reapportionment provisions of the statute as they apply to the senate. It would appear that when provision was made in Chapter 22 for representation in the Wyoming senate, the legislature acted upon a theory and belief that the apportionment of one house of its bicameral legislature on a population basis would satisfy constitutional requirements.[5] As has been stated, this is not the law, and it is now generally accepted by the parties hereto that the Wyoming senate, as constituted under the provisions of Chapter 22, is an invidious discrimination against the voters of the state, and that part of the statute fixing representation in the senate is null and void.[6]

---

[5]To illustrate the disparity, the six most populous counties in the state, with a population of approximately 65% of the entire state population, have only 8 senators, while the six least populous counties in the state, with only 8% of the total state population, have 6 senators.

[6]Shortly after the recent Supreme Court decisions herein referred to, a special session of the Wyoming legislature was called for the purpose of providing for submission to the Wyoming electorate a constitutional amendment which would authorize the legislature to create election districts from which members of the Wyoming legislature could be elected pursuant to the constitutional standards. The result of the special session was fruitless.

The primary obligation to establish constitutional representation in the Wyoming legislature lies, not with this court, but with those whose duty it is to enact laws according to constitutional standards. Although there is no longer any doubt concerning the power of the federal courts to protect citizens and to take the necessary action to enforce rights guaranteed by the Federal Constitution in cases such as this, still the court believes that the people of the State of Wyoming will best be served by withholding any immediate affirmative judicial relief in order to permit the legislature to consider reapportionment of its senate and to enact, as soon as possible, a valid law which meets the requirements of the Constitution of the United States.[7] The court, however, will retain jurisdiction of this case and if the Wyoming legislature fails to reapportion the senate prior to the 1966 election, this court will in due time, exercise its power and make the reapportionment by judicial decree.

It should be noted that the Wyoming Constitution provides that each county shall constitute an election district and have at least one senator and one representative in the legislature, but at no time is the number of members of the house of representatives to be less than twice nor greater than three times the number of the senate. The court thinks it appropriate that the legal effect of these provisions be discussed. While it is mathematically possible that these constitutional requirements could be satisfied; the court is of the opinion that the conditions and circumstances existing in the State of Wyoming are such that literal compliance with these provisions would produce a result that would be wholly unreasonable, untenable and impractical. The end result of literal compliance would be a legislature substantially in excess of 300 members. However, it is obvious, that the Wyoming Constitutional Convention which

---

[7]The first opportunity will be the next legislature, which convenes in January, 1965.

agreed upon a state constitution intended that the legislative bodies should be comparatively small. It could not have envisioned such an absurd result as would be brought about if the state senate is constituted with each county as a senatorial election dictrict and the county with the least population fixing as near as may be the minimum unit for district representation.[8] While the wisdom or policy of constitutional provisions are not to be questioned, still courts are not required to act in a manner which brings about such palpable absurdities. 16 C.J.S. Constitutional Law, §18; 16 Am. Jur. 2d, Constitutional Law, §76; Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122[9]; State v. School District No. 1 of Fergus County, 136 Mont. 453, 348 P.2d 797, 78 A.L.R.2d 1012; Mahood v. City & County of Denver, 118 Colo. 338, 195 P.2d 379; Bd. of County Comm'rs v. McCulloh, 52 N.M. 210, 195 P.2d 1005; Mitchell v. Lowden, 288 Ill. 327, 123 N.E. 566. In construing constitutional provisions, the fundamental purpose is to give effect to their purpose and intent. Court will not ignore the general spirit of the instrument. 16 Am.Jur.2d Constitutional Law, §75; 16 C.J.S. Constitutional Law, §16; United States v. Classic, 313 U.S. 299, rehearing denied 314 U.S. 707; Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518; Kreps v. Brady, 37 Okl. 754, 133 P. 216; State v. School Dist. No. 1, Fergus County, supra. That the Wyoming

---

[8]Using the population of Teton County as the divisor, the four most populous counties would be entitled to 52 senators.

[9]In Sturges v. Crowninsheild, 17 U.S. (4 Wheat.) 122, 202-203, Chief Justice Marshall, in discussing the interpretation of constitutional provisions, stated:

"But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provisions to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

We think that language particularly appropriate here. None of the recent cases in this area require that a federal court adhere blindly to state law when to do so would produce a ridiculous result or perpetuate a manifest injustice upon a state and its people.

Constitutional Convention intended to create a legislature of relatively small size as befits the needs of such a sparsely populated state, is too clear for doubt. For instance, the first legislature consisted of 16 senators and 33 representatives. Article 3, §50, Wyoming Constitution. This principle of smallness has been acquiesced in by the Wyoming people since statehood in 1890, and in determining the intent and purpose of the provision in question, great weight should be given to that acquiescence. 16 C.J.S. Constitutional Law, §34; 16 Am.Jur.2d. Constitutional Law, §84. Therefore, if the court is required to make the reapportionment of the Wyoming senate by judicial decree, it will do so without regard to the Wyoming constitutional provisions insofar as they relate to the members of the senate, and will establish senatorial election districts to carry out the intent and purpose of the constitution, and at the same time provide for protection of the Wyoming electorate as guaranteed by the Fourteenth Amendment. So far as this Court is concerned, the Wyoming legislature may proceed likewise.

In summary, we hold: (1) That the Wyoming Reapportionment Act of 1963, (Chapter 22, Session Laws of Wyoming, 1963), insofar as it provides for representation in the state senate, constitutes an invidious discrimination, and violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; (2) that the Reapportionment Act of 1963, (Chapter 22), insofar as it provides for representation in the house of representatives, is not an invidious discrimination and does not violate the Fourteenth Amendment to the Constitution of the United States; (3) that the conditions and circumstances existing in the State of Wyoming are such that the provisions of Section 3, Article 3 of the Wyoming Constitution, which constitutes each county an election district and requires that each county be represented by at least one senator, is ineffective and is not to be considered when

determination is made of the reapportionment of the Wyoming state senate; (4) that the judgment of this court, as reflected in paragraphs 1, 2 and 3 above, shall be a final judgment and, as such, subject to immediate review by either party; and (5) that jurisdiction of this case in all other respects, including the granting of injunctive and affirmative relief to plaintiffs, is retained. By this determination we do not disturb the apportionment of the Wyoming legislature as it is constituted for the 1965 session.

A judgment will be entered accordingly.

BY THE COURT:

JOHN C. PICKETT

EWING T. KERR

FRED DAUGHERTY

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

October 8, 1965

HARRY H. SCHAEFER, ADRIAN W. REYNOLDS, BURTON W. MARSTON, PATRICK H. MEENAN, DARLENE ELLIOT, RALPH A. URBIGKIT and EDWIN H. WHITEHEAD,

Plaintiffs

vs.

THYRA THOMSON, as Secretary of State of the State of Wyoming, THYRA THOMSON, MINNIE A. MITCHELL and EVERETT T. COPENHAVER, as members of the Board of the State Board of Election Canvassers, and CLIFFORD P. HANSEN, as Governor of the State of Wyoming,

Defendants

WILLIAM H. HARRISON, KENNETH YOUTZ, WILBUR MEAD, LEWIS F. HANSON and CARL EMERICH,

Intervenors

No. 4717 CIVIL

A. G. McClintock, Walter G. Urbigkit, Jr., and Maxwell E. Osborn, all of Cheyenne, Wyoming, Attorneys for Plaintiffs.

John F. Raper, Attorney General of the State of Wyoming, Cheyenne, Wyoming, and Dean W. Borthwick, Deputy Attorney General of the State of Wyoming, Cheyenne, Wyoming, Attorneys for Defendants.

Paul B. Godfrey and Arthur Kline, Cheyenne, Wyoming, Attorneys for Intervenors.

Before JOHN C. PICKETT, United States Circuit Judge; EWING T. KERR, United States District Judge; and FRED DAUGHERTY, United States District Judge.

KERR, District Judge.

On November 23, 1964, this Court retained jurisdiction over this cause to afford injunctive and affirmative relief to the plaintiffs should "the Wyoming legislature fail to reapportion the state senate prior to the 1966 election * * *."[1] At the original hearing of this proceeding we were of the opinion that it is primarily the duty of the state legislature to establish constitutional representation in the Wyoming State Senate. Affirmative judicial relief, therefore, was held in abeyance in order to give the Wyoming State Legislature the opportunity to redistrict the state and to enact a valid reapportionment law consonant with the United States constitutional requirements. Though several apportionment bills were introduced at the 38th Session of the Wyoming State Legislature[2] none was enacted into law.

Due to the failure of the Wyoming legislature to redistrict the state and to provide nearly equal representation in the state Senate on the basis of population, it is now incumbent upon this Court to reapportion the state Senate by judicial decree. Accordingly, on July 23, 1965, this Court ordered a Pre-trial Conference to be held on August 31, 1965. At said Pre-trial Conference all the exhibits were offered and received, and the Court heard the arguments of counsel in support of the proposed reapportionment plans. In considering this problem of apportioning the state Senate this Court has had the benefit of the carefully prepared memorandum briefs and statistical analyses. The parties agreed that no additional evidence was necessary for the disposition of this case, and that the Court may decide the case upon the record of the pre-trial conference.

We reiterate our previous opinion that the Wyoming Reapportionment Act of 1963 (Chapter 22, Session Laws

---

[1]Schaefer, et al. v. Thomson, et al., D. Wyo., 240 F.Supp. 247 (1964).

[2]Convened January 12, 1965; Adjourned February 20, 1965.

of Wyoming, 1963) is not an invidious discrimination insofar as it provides for representation in the State House of Representatives and in that respect it does not violate the Fourteenth Amendment to the United States Constitution. Holding that the Wyoming Senate, as constituted under said Reapportionment Act, was an invidious discrimination against the voters of the state, it was also the judgment of this Court that Section 3, Article 3 of the Wyoming Constitution is not to be considered when determination is made of the reapportionment of the Wyoming State Senate. We adhere to our original finding "that the conditions and circumstances existing in the state of Wyoming are such that the provisions of Section 3, Article 3 of the Wyoming Constitution, which constitutes each county an election district and requires that each county be represented by at least one senator, is ineffective and is not to be considered when determination is made of the reapportionment of the Wyoming state senate".

We are confronted, therefore, with the problem of reforming the senatorial districts to comply with the one-man-one-vote constitutional standard, and to take care of the transition from the present unconstitutionally composed Senate to the corrected one.

Under the Wyoming Reapportionment Act of 1963, each county in the state has one senator, except for the two largest counties, Laramie and Natrona, each of which is represented by two senators. This results in a representation in those counties of one senator for approximately 30,000 inhabitants, whereas one senator in the smallest county represents 3,062. The only solution to this distorted representation is to rearrange the Wyoming constitutional scheme of districting. Combining some of the small over-represented counties into one district increases the number of inhabitants in the district and reduces the disparity in representation.

A membership of thirty senators is the constitutional maximum as determined by the present membership in the

state House of Representatives.[3] The parties agreed that the composition of the Senate should not exceed thirty members. We acquiesce.

To protect the electorate's constitutional right to equal representation in both houses of the legislature, we hereby allot one Senator per 11,500 inhabitants or major fraction thereof, and establish seventeen senatorial election districts. Whenever possible, we have preserved the established county boundaries, and have deviated therefrom only when necessary to satisfy the one-man-one-vote mandate of the equal protection clause of the federal constitution. We have combined only contiguous counties. (See Appendix "A") Applying the formula of one Senator for every 11,500 inhabitants or major fraction thereof, the state is hereby divided into the following districts and the Senators are apportioned as follows:[4]

Counties	Senatorial Districts	Total population of District	Number of Senators
Albany	1	21,290	2
Big Horn	1	11,898	1
Campbell and Johnson	1	11,336	1
Carbon	1	14,937	1
Converse and Niobrara	1	10,116	1
Crook and Weston	1	12,620	1
Fremont and Hot Springs	1	32,533	3
Goshen	1	11,941	1
Laramie	1	60,149	5
Natrona	1	49,623	4
Park	1	16,874	2
Platte	1	7,195	1
Sheridan	1	18,989	2
Sublette, Teton and North Lincoln	1	11,245	1
Sweetwater	1	17,920	2
Uinta and South Lincoln	1	12,097	1
Washakie	1	8,883	1
	17	329,646	30

[3]Wyoming Constitution, Art. 3, Sec. 3, provides in part: " * * * but at no time shall the number of members of the house of representatives be less than twice nor more than three times the number of members of the senate." The existing house of representatives numbers 61 members.

[4]Population figures are taken from the United States Census of Population for 1960.

It is only after careful consideration and serious study that we have concluded that it is necessary to divide Lincoln County. The western and southwestern part of the State of Wyoming is not without its difficulties. There appears to be no way to apportion the population in Teton and Sublette Counties, with a combined population of only 6,840, without placing the north-half of Lincoln County within that district. This action is not unreasonable or arbitrary when one considers the population and geographical arrangement in this western and southwestern area. The only rational apportionment for the four counties in this area is to allow one Senator for the District of Teton, Sublette and the north-half of Lincoln County with the combined population of 11,234; and to join the south-half of Lincoln County with Uinta County as one District with a total population of 12,097, which entitles them to one Senator.

The point of division in Lincoln County is easily ascertainable by a natural boundary line. (See Appendix "B"). To form the new senatorial districts, Lincoln County will be divided at the township line common to Townships 26 and 27 North, 6th Principal Meridian, Wyoming. All that portion of Lincoln County lying north of the southern boundary line of Township 27 North, 6th Principal Meridian, Wyoming, is included in the Teton County, Sublette County and North Lincoln County senatorial district. All that portion of Lincoln County lying south of the southern boundary line of Township 27 North, 6th Principal Meridian, Wyoming, is included in the Uinta County and South Lincoln County senatorial district.

We are not persuaded that the plans proposed by the defendants are feasible. They are too complex. They would require this Court not only to combine certain counties but also to divide each of the six largest counties into several senatorial districts. Defendants' proposed plans

do not contain a clear, concise, convenient or equitable method of outlining the districts.

The Intervenors were unable to cite any authorities, nor have we been able to find any, directing the federal courts to sub-district the multi-member districts. We believe that the reapportionment and redistricting herein ordered satisfies the United States Supreme Court standard of "substantial quality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State". Reynolds v. Sims, 377 U.S. 533, 579. Under this posture we need go no further.

Mathematical precision is not a constitutional requisite. Reynolds v. Sims, supra. We have prescribed apportionment on a population basis, reducing the dilution in voting power from the ratio of 20 to 1 under the Wyoming Reapportionment Act of 1963 to the ratio of 2.08 to 1. It is not our goal to intrude on the state's political affairs; rather, we would formulate a basic pattern of equality in the right of suffrage to guide the state legislature in its future periodic readjustments and revisions as they become necessary to accommodate population shifts and growth.

No inference is to be drawn that the laws enacted by the 38th Wyoming State Legislature are invalid by reason of our finding that the representation in the state Senate constitutes an invidious discrimination. By our previous opinion we did not disturb the apportionment of the Wyoming legislature as it was constituted for the 1965 Session, and it sat as the duly convened legislative body of the State of Wyoming. By the same token, the members of the Senate of the 38th Wyoming State Legislature shall continue their term of office until the commencement of the 39th Wyoming State Legislature in January 1967, as the state of Wyoming must have a legislature at all times during this period of transition.

The final problem to be resolved is the method of transition from the improperly apportioned state Senate to the apportionment directed by this Court.

The present Wyoming Senators hold office pursuant to Article 3, Section 3 of the Wyoming Constitution, which we hold an invidious discrimination insofar as it requires that each county constitutes an election district for the election of state Senators and that each county have at least one Senator. Furthermore, some of the Senators were elected and hold office pursuant to Chapter 22, Session Laws of Wyoming 1963, which we have held is contrary to the requirements of the Fourteenth Amendment of the United States Constitution and null and void insofar as it relates to the Wyoming Senate.[5]

Twelve of the present twenty-five Senators elected at the last general election would serve until January 1969, namely, those from Big Horn, Fremont and Goshen Counties, both the Senators from Laramie County, one of the two Senators from Natrona County, and the Senators from Niobrara, Park, Sheridan, Sublette, Teton and Uinta Counties.[6] Of the total number of hold-overs, only two Senators would continue to represent the same electorate by whom they were elected, namely, Big Horn and Goshen Counties. If the other hold-over Senators were permitted to finish their terms of office, the following inequities would result:

(1) The inhabitants of Hot Springs County, Converse County and Lincoln County would be without voter representation in the Senate until January 1969 for they would be represented by the hold-over Senators from Fremont, Niobrara, Sublette, Teton and Uinta Counties, respectively, for whom they had no opportunity to vote.

(2) The inhabitants in the new senatorial district embracing Teton and Sublette Counties, two of the smallest

[5]Schaefer, et al. v. Thomson, et al., D. Wyo., 240 F.Supp 247, 252.

[6]Wyoming Official Directory, Compiled by the Secretary of State of Wyoming, Page 46.

counties in the State, would be grossly over-represented because of their two hold-over Senators, both of whom would continue to represent the new district until January 1969.

(3) The two hold-over Senators from Laramie County would represent, mathematically speaking, 30,000 inhabitants. Each of the three additional new Senators would represent 20,000 inhabitants, whereas under the new apportionment directed by this Court, there is to be a Senator for every 12,000 inhabitants in Laramie County.

(4) The same misrepresentation would result in Natrona, Park and Sheridan Counties where additional Senators are to be added under the apportionment directed herein and where the presently elected Senators would hold over until January 1969.

The foregoing analysis demonstrates a situation that would be palpably unjust, irrational and constitutionally impermissible. Unequal representation in eight out of the seventeen new districts would continue until January 1969. This is an unnecessary delay, especially in view of the fact that we are sitting now to effect justice and to remedy the invidious discrimination in the Wyoming Senate. The inhabitants of the State of Wyoming have a federally guaranteed right to a constitutionally apportioned legislature in January 1967. We would be remiss in our duties were we to require them to wait until 1969 to enjoy equal representation in the Senate. That we have the authority to order remedial machinery was clearly announced in Reynolds v. Sims, supra.

Article 21, Section 18 of the Wyoming Constitution designates how the Legislature of the state of Wyoming shall be chosen: "Senators and members of the house of representatives shall be chosen by the qualified electors of the several senatorial and representative districts as established in this constitution, until such districts shall be changed by law, and thereafter by the qualified electors

of the several districts as the same shall be established by law".

The senatorial districts are now hereby changed. All the thirty Senators, therefore, who will comprise the 39th Legislature which will convene in January 1967, must be elected by the qualified electors of the senatorial districts as established herein. This is the only way to effectuate a constitutionally constituted state legislature at the next regular session commencing January 1967.

The procedure to be followed will be the same as that when the Senators were first elected after the adoption of the Wyoming Constitution. The terms of office for which the newly elected Senators will run and be elected will not be specified on the ballots. After the election the Senators will "be divided by lots into two classes as nearly equal as may be. The seats of the Senators of the first class shall be vacated at the expiration of the first two years, and of the second class at the expiration of four years."[7] The procedure followed by the First Wyoming Legislature on December 18, 1890, provides a pattern for the drawing of lots.[8] On that day lots were drawn for the two year and four year terms, pursuant to the following resolution:

> "Whereas, by the requirements of the Constitution it is necessary that the members of the Senate decide by lot who of its members shall hold for four (4) years: Therefore be it Resolved:
>
> That the drawing be made the special order of the day for December 18, 1890 and that the rules governing and the method of making the drawing be as follows, to-wit:—In the case of counties having two (2) or more Senators, the Senators from such county shall draw between themselves for the long or short term, and in the cases of counties represented by only one Senator, all of the Senators representing a county hav-

---

[7]Wyoming Constitution, Article 3, Section 2.

[8]State of Wyoming, Senate Journal, First Wyoming Legislature, Page 246.

ing only one Senator, shall draw between themselves for the long or short term.

The manner of drawing shall be as follows: in the case of the drawing between two or more Senators from the same county, the chief clerk shall place in a hat as many slips of paper of the same size and texture as there are Senators to draw. Upon one of said slips shall be written the words 'Long Term' and upon the others 'Short Term',—each of the Senators shall draw from the hat one of the slips of paper and announce which term he has drawn: he shall then hand the slip so drawn to the Chief Clerk, who shall also announce which term has been drawn.

In the case of the drawing between Senators representing counties having but one Senator, the Chief Clerk shall place in a hat as many slips of paper of the same size and texture as there are Senators so entitled to draw, upon three of which slips the words 'Long Term' shall be written, and upon the remaining slips the words 'Short Term' shall be written.

Provided further, that the proceedings of the said drawing shall be made a minute of record on the Journal of the Senate and that certificates shall be issued to the Senators drawing the long term: said certificates to be signed by the President of the Senate and attested by the Chief Clerk."

For the foregoing reasons we hold:

(1) That Article 3, Section 3, of the Wyoming Constitution is an invidious discrimination insofar as it requires that each county shall comprise a senatorial district and shall have at least one Senator;

(2) That the apportionment of the Wyoming State Senate as provided by Chapter 22, Session Laws of Wyoming 1963 is unconstitutional and void;

(3) That the defendants, and each of them, and any and all persons acting in active concert and participation with them, be forever enjoined and restrained from taking any steps in the furtherance or conduct of the next general

election of members of the Wyoming State Senate, in accordance with the provisions of Chapter 22, Session Laws of Wyoming 1963, insofar as said law pertains to the Senate of the Wyoming State Legislature;

(4) That the districting of the state for the apportionment and election of the members of the state Senate as set forth herein be complied with;

(5) That the defendants and all persons acting in concert and participation with them conduct the next general election in accordance with the districting and apportionment ordered herein;[9]

(6) That the intervenors take nothing by their complaint; and

(7) That nothing herein shall be construed to have retroactive effect with respect to the laws enacted by the 38th Session of the Wyoming State Legislature, or the terms of office of the present state Senators, except that said terms of office of the present state Senators shall expire in January 1967 at the commencement of the newly constituted Wyoming State Legislature.

This memorandum opinion sufficiently states the Findings of Fact and Conclusions of Law and additional Findings of Fact and Conclusions of Law are not necessary.

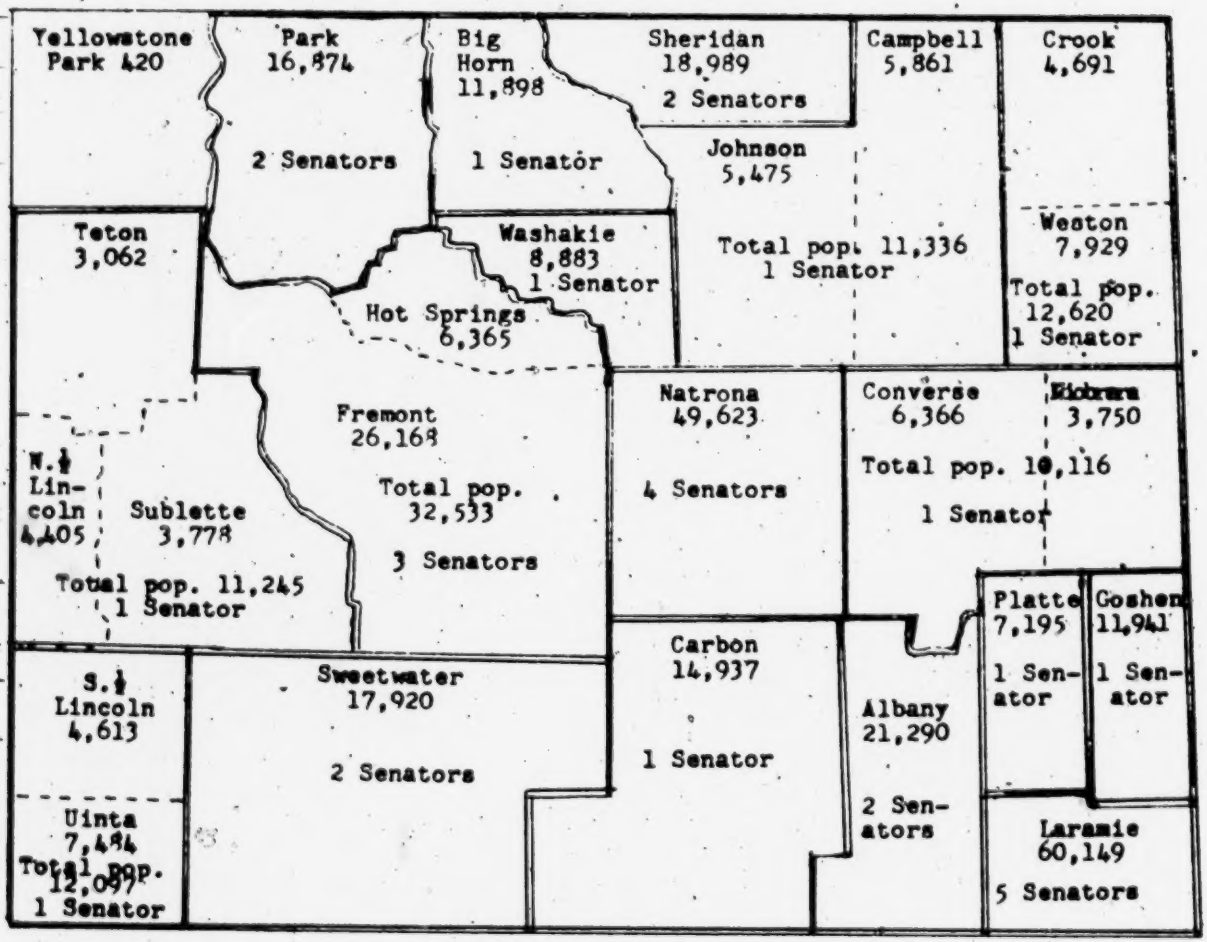
Judgment will be entered accordingly.

---

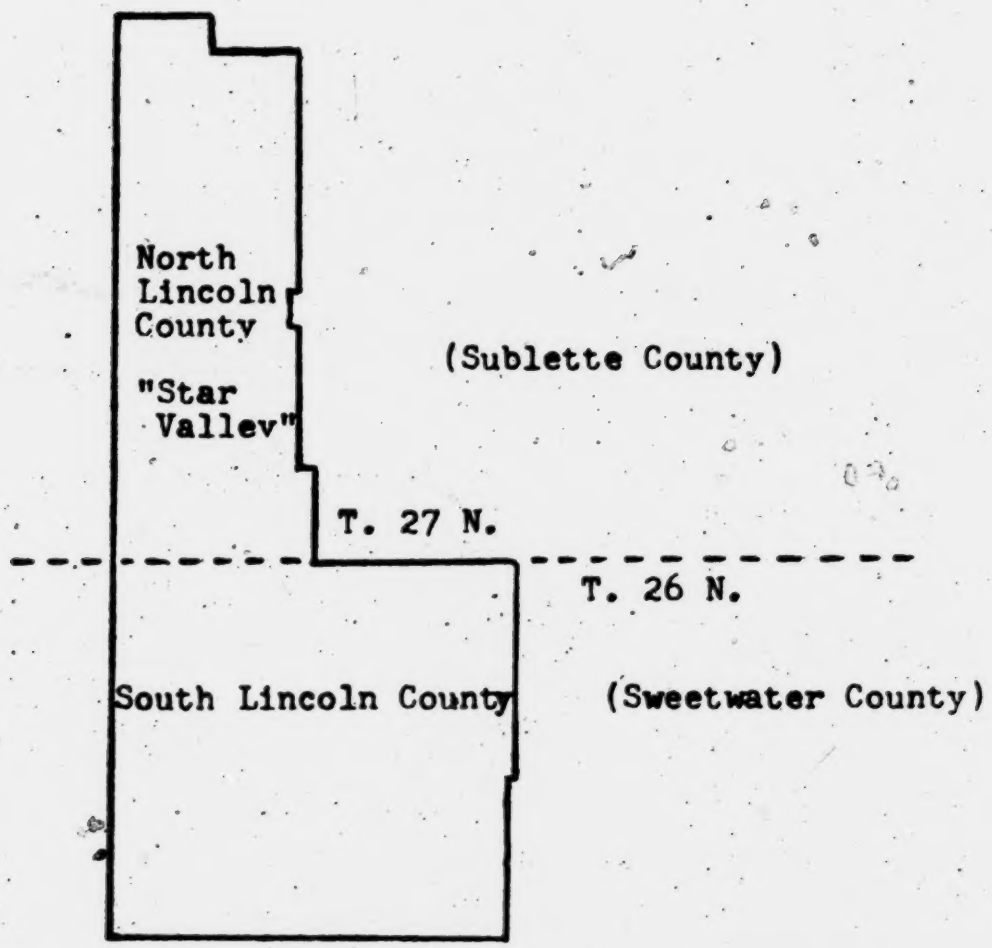
[9]We are not unmindful that some of the election procedures will have to be adapted to the redistricting and reapportionment ordered herein. Adjustments will be necessary with respect to Lincoln County, in particular, which has been divided for the purpose of reapportionment.

APPENDIX "A".

17 SENATORIAL DISTRICTS.



APPENDIX "B"



Lincoln County showing township line common to Townships 26 & 27 North Dividing Lincoln County to be included in two separate Senatorial Districts.

APPENDIX B(1)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

HARRY H. SCHAEFER, ADRIAN W. REYNOLDS, BURTON W. MARSTON, PATRICK H. MEENAN, DARLENE ELLIOT, RALPH A. URBIGKIT and EDWIN H. WHITEHEAD, *Plaintiffs*	
vs.	
THYRA THOMSON, as Secretary of State of the State of Wyoming, THYRA THOMSON, MINNIE A. MITCHELL and EVERETT T. COPENHAVER, as members of the Board of the State Board of Election Canvassers, and CLIFFORD P. HANSEN, as Governor of the State of Wyoming, *Defendants*	No. 4717 CIVIL
WILLIAM H. HARRISON, KENNETH YOUTZ, WILBUR MEAD, LEWIS F. HANSON and CARL EMERICH, *Intervenors*	

JUDGMENT

The above entitled action came on regularly for hearing before a duly constituted Three-Judge Court consisting of John C. Pickett, United States Circuit Judge, and Ewing T. Kerr and Fred A. Daugherty, United States District Judges. The issues having been duly submitted and heard for and on behalf of the plaintiffs, the defendants, and the intervenors, and the Court having filed herein a memorandum decision which is deemed sufficient as Findings of Fact and Conclusions of Law, pursuant to Rule 52 (a), Federal Rules of Civil Procedure:

IT IS THEREFORE ORDERED AND ADJUDGED:

1. That Article 3, Section 3, of the Wyoming Constitution is an invidious discrimination insofar as it requires that each county shall comprise a senatorial district and shall have at least one Senator.

2. That the apportionment of the Wyoming State Senate as provided by Chapter 22, Session Laws of Wyoming 1963 is unconstitutional and void.

3. That the defendants, and each of them, and any and all persons acting in active concert and participation with them, be forever enjoined and restrained from taking any steps in the furtherance or conduct of the next general election of members of the Wyoming State Senate, in accordance with the provisions of Chapter 22, Session Laws of Wyoming 1963, insofar as said law pertains to the Senate of the Wyoming State Legislature.

4. That the state of Wyoming be, and the same is hereby, divided into the following senatorial districts and that the Wyoming State Senators be, and the same are hereby, apportioned therein as follows:

Counties	Senatorial Districts	Number of Senators
Albany	1	2
Big Horn	1	1
Campbell and Johnson	1	1
Carbon	1	1
Converse and Niobrara	1	1
Crook and Weston	1	1
Fremont and Hot Springs	1	3
Goshen	1	1
Laramie	1	5
Natrona	1	4
Park	1	2
Platte	1	1

Sheridan	1	2
Sublette, Teton and North Lincoln	1	1
Sweetwater	1	2
Uinta and South Lincoln	1	1
Washakie	1	1
Total	17	30

5. That Lincoln County, for the purpose of reapportionment, be, and the same is hereby, divided into North Lincoln County and South Lincoln County at the township line common to Townships 26 and 27 North, 6th P.M., Wyoming.

6. That the members of the newly constituted Wyoming Senate be nominated and elected without reference to a term of office, and that they draw lots for the two year and four year terms after the commencement of the 39th Session of the Wyoming State Legislature in January 1967.

7. That the defendants and all persons acting in concert and participation with them conduct the next general election in accordance with the districting and apportionment ordered herein.

8. That the intervenors take nothing by their complaint.

9. That nothing herein shall be construed to have retroactive effect with respect to the laws enacted by the 38th Session of the Wyoming State Legislature, or the terms of office of the present state Senators, except that said terms of office of all the present state Senators shall expire in January 1967, at the time of the expiration of the terms of office of the members of the House of Representatives.

IT IS FURTHER ORDERED that each party shall pay its own costs.

Dated at Cheyenne, Wyoming, this 8th day of October 1965.

/s/ JOHN C. PICKETT
United States Circuit Judge

/s/ EWING T. KERR
United States District Judge

/s/ FRED A. DAUGHERTY by E.T.K.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

HARRY H. SCHAEFER, et al., *Plaintiffs* vs. THYRA THOMSON, as Secretary of State of the State of Wyoming, et al., *Defendants* vs. WILLIAM H. HARRISON, et al., *Intervenors*	No. 4717 CIVIL

AFFIDAVIT

Keith F. Marsh, being first duly sworn on oath, says:

1. That he is presently a student at the University of Wyoming, majoring in political science.

2. That at the request of the attorneys for the Intervenors, Henderson, Godfrey, Kline & Uchner of Cheyenne, Wyoming, he has reviewed certain information and made inquiries from certain parties to obtain information which is reflected in Intervenors' Exhibit "1".

3. That the information contained in Intervenors Exhibit "I" is true to the best of his knowledge and belief and the calculations reflected therein are accurate to the best of his knowledge and belief.

4. That based upon his information and belief, no Representatives or Senators to the Wyoming State Legislature have been elected from precincts 1-1 through 1-8 for

many years and more particularly since the 28th Legislature which convened in the year 1945; that said precincts comprise what is commonly known as South Cheyenne.

5. That the voters in the precincts comprising South Cheyenne cast approximately 2,870 votes in the general election of November, 1964.

6. That to the best of his knowledge and belief, no Representative or Senator listing his or her address as outside the corporate limits of the City of Cheyenne, Wyoming, has been elected to the Wyoming Legislature since the Session which convened in 1953; that no rural Legislator was elected in the Session which convened in 1951 and one Legislator outside the corporate limits of the City of Cheyenne was elected in the Session which convened in the year 1949.

7. That as is reflected in Exhibit "I" the official registration of voters indicates that there were 5,372 voters outside the corporate limits of Cheyenne on August 12, 1965, 4,984 outside the corporate limits on January 17, 1962 and 3,847 on July 13, 1960; that said number of voters residing outside the corporate limits of the City of Cheyenne appears to be increasing at a substantial rate each year while there continues to be no Representative or Senator elected from without the said corporate limits.

8. That the Town of Pine Bluffs, an incorporated town, which is located approximately 45 miles from Cheyenne, has a population of approximately 1,200 people and is essentially a rural community.

9. That the 1960 Federal Census revealed that the population of Laramie County was 60,149 people, of whom 43,505 resided within the corporate limits of the City of Cheyenne and the remainder presumably resided without the corporate limits of the City of Cheyenne; that the said non-Cheyenne residents are presumably rural in nature for the reason that there are no other major towns or cities in Laramie County, Wyoming, other than the Town of Pine

Bluffs which has a population of approximately 1,200 people.

10. That the records reveal that the two Senators elected from Laramie County in the years 1951 through 1965 resided in the northwest area of the corporate limits of the City of Cheyenne and, in fact, resided within a few blocks of each other; that, for example, the records indicate that R. J. Keelan and W. A. Norris, Jr., were the two Senators from Laramie County in the years 1957, 1959, 1961 and 1963; that during the years 1957 through 1961, R. J. Keelan and W. A. Norris apparently lived within one block of each other for the reason that the address of R. J. Keelan is listed as 332 W. 7th Avenue and the address of W. A. Norris, Jr. is listed as 320 W. 7th Avenue.

11. That during the general election of 1964, 2,870 votes were cast in District No. 1, 5,291 votes were cast in District No. 2, 6,926 votes were cast in District No. 3 and 4,790 votes were cast in District No. 4.

12. That based solely upon a rough and inexact location of the residences of the Representatives and Senators from Laramie County in the 1964 election, it appears that eight of the Representatives resided in District No. 2 which cast 5,291 votes; that two of the Representatives resided in District No. 3 which cast 6,926 votes and one of the Representatives resides in District No. 4 which cast 4,790 votes; that no Representative was elected from District No. 1; that each Representative in District No. 2 represents approximately 661 votes while each Representative in District No. 3 represents approximately 3,463 voters and one Representative in District No. 4 represents 4,790 voters.

13. That not since the 1949 Legislature has any Representative from Laramie County listed "farming" as his occupation and not since the 1955 Legislature has any Representative listed "ranching" as his occupation and the Legislator listing "ranching" in 1955 was actually a resi-

dent of the City of Cheyenne as revealed by the address listed on the official records.

14. That the Representative and Senatorial Districts established for Laramie County in Intervenors' Exhibit "I" are based on registered voters which appears to be a more fair and equitable method since there is a large military non-voting population in Laramie County.

FURTHER AFFIANT SAYETH NOT.

/s/ KEITH F. MARSH

Subscribed and sworn to before me, a Notary Public, this 20th day of August, 1965.

/s/ JANE YEAMAN
Notary Public

APPENDIX D

Excerpt from *Drew vs Scranton*, 229 F.Supp. 310, (1964) at Page 326:

[9] The plaintiffs' contention is that thus providing a haphazard arrangement of two, three and four-member districts alongside of single-member districts violates the basic principle of one man—one vote which is, as we have seen, implicit in the constitutional concept of equal protection of the laws in this field. We are constrained to agree with this contention.

Theoretically, at least, when an electorate is called upon to select from their number a smaller group to speak and act for them in a representative assembly, each voter should participate in the selection of one of the representatives only. For since the persons elected are to comprise a boiled down reflection, as it were, of the larger electorate, and since each of them, therefore, in a very real sense stands in the assembly in the place of a group of voters, it would appear to interfere with and dilute the voting rights of others for a voter to participate in the election of more than one representative. It is doubtless upon this principle that the single-member district system has become the widely accepted method of electing the members of Congress and of many other legislative bodies.

However this may be, we think that invidious discrimination in voting power results when, as in the case before us, some Pennsylvania voters may by reason of the arrangement of legislative districts vote for two, three or even four representatives, while others are restricted to voting for one only. Certainly a voter in a four-member district will not only have four votes for representative, but he will also have four members of the House who will be especially concerned with his views and interests and amenable to his persuasion, since they will want the bene-

fit of his suffrage for reelection. The voter in a single-member district, however, will have only one representative to look to express his views and espouse his interests. We are, of course, not dealing here with a case where all the representatives are elected at large, so that each voter has the same number of votes as every other voter, or with a situation where the districts all elect the same number of members, whether two or more. Those situations do not violate the principle of one man—one vote. But we think that this principle means what it says. It does not mean, for example, in Allegheny County one man—one vote in McKeesport, two votes in Clairton, three votes in Wilkinsburg and four votes in Sewickley, which the statute under consideration authorizes.

It is likewise true we think, as the plaintiffs in No. 8338 urge, that the single-member district has important advantages over the multi-member district or election at large in bringing about a better representation of the body of the voters. Minority groups living in particular localities may well be submerged in elections at large but can often make their voting power much more effective in the smaller single-member district in which they may live. Moreover, a much more widespread personal contact between the representative and his constituents and knowledge by the representative of the views and desires of the voters is possible in a single-member district than in a larger multi-member one where the number of voters is much greater and the responsibility of representation is divided among two or more representatives answerable to the same electorate.

• • •

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 25 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

NO. 854

WILLIAM H. HARRISON, KENNETH YOUTZ, WILBUR MEAD, LEWIS F. HANSON and CARL EMRICH,

Appellants

VS.

HARRY H. SCHAEFER, ADRIAN W. REYNOLDS, BURTON W. MARSTON, PATRICK H. MEENAN, DARLENE ELIOTT, RALPH A. URBIGKIT and EDWIN H. WHITEHEAD, THYRA THOMSON, as Secretary of State of the State of Wyoming, THYRA THOMSON, MINNIE A. MITCHELL and EVERETT T. COPENHAVER, as members of the Board of the State Board of Election Canvassers, and CLIFFORD P. HANSEN, as Governor of the State of Wyoming,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

MOTION TO AFFIRM

A. G. McCLINTOCK
WALTER C. URBIGKIT, JR.
304 West 20th Street
Cheyenne, Wyoming
Attorneys for Appellees

Roy F. Frey Co., Denver, Colo.

INDEX

	Page
Motion to Affirm	1
I. Issue Involved and Question Presented	2
II. Introduction	2
III. Definition of the Issue Involved	2
IV. Statement of the Facts	3
V. Argument	4
VI. Conclusion	7

CITATIONS

Fortson vs Dorsey, 379 U.S. 433, 13 L.ed. 2d 401, 85 S.Ct. 498 (1965)	4
Lucas vs Forty-fourth Assembly, 379 U.S. 693, 13 L.ed. 2d 699, 85 S.Ct. 715 (1965)	4
Scranton vs Drew, 379 U.S. 40, 13 L.ed. 2d 107, 85 S.Ct. 207 (1964)	4
State vs Gage, Wyo., 377 Pac. 2d 299	2

CONSTITUTIONAL PROVISIONS

Sec. 3, Article III, *Wyoming Constitution*	5

IN THE

Supreme Court of the United States

NO. 854

WILLIAM H. HARRISON, KENNETH YOUTZ, WILBUR MEAD, LEWIS F. HANSON and CARL EMRICH,

Appellants

vs.

HARRY H. SCHAEFER, ADRIAN W. REYNOLDS, BURTON W. MARSTON, PATRICK H. MEENAN, DARLENE ELIOTT, RALPH A. URBIGKIT and EDWIN H. WHITEHEAD, THYRA THOMSON, as Secretary of State of the State of Wyoming, THYRA THOMSON, MINNIE A. MITCHELL and EVERETT T. COPENHAVER, as members of the Board of the State Board of Election Canvassers, and CLIFFORD P. HANSEN, as Governor of the State of Wyoming,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

MOTION TO AFFIRM

Appellees, HARRY H. SCHAEFER, ADRIAN W. REYNOLDS, BURTON W. MARSTON, PATRICK H. MEENAN, DARLENE ELIOTT, RALPH A. URBIGKIT and EDWIN H. WHITEHEAD, by their counsel and pursuant to Rule 16 of the Rules of the Supreme Court, move the Court to affirm the decision of the District Court.

The Motion to Affirm the Judgment is submitted on the grounds that the questions upon which the decisions of the cause depends are so unsubstantial as to not need further argument.

I.

ISSUE INVOLVED AND QUESTION PRESENTED

Without regard for Appellant's various restatements the essential issue is whether or not the equal protection clause of the Constitution of the United States of America requires that a state's legislative districts be so constituted that one legislative representative only would be elected from each district with multi-member districts being consequently prohibited.

II.

INTRODUCTION

The present appeal is only another step in reapportionment litigation in Wyoming, commenced in 1962 by filing a lawsuit in the state courts, which was terminated by decision on January 7, 1963, *State vs Gage*, Wyo., 377 Pac. 2d 299. These Appellees and the organization which they represent have been involved since 1962 in this litigative effort to afford a constitutional apportionment of the Wyoming State Legislature.

Since success on the broad issue has now been achieved the fight has turned to side attacks, rather than the direct attack on judicial apportionment, and has developed into the present contention that the judiciary is required to provide all one-member districts in legislative apportionment as a replacement for the multi-member districts previously existant and as provided by state constitution.

III.

DEFINITION OF THE ISSUE INVOLVED

A. The question of apportionment of the House of

Representatives of the State of Wyoming should not now be before this Court, since by Order and Judgment dated November 23, 1964, 240 F. Supp 247, the United States District Court found the apportionment of the House to be constitutional and that decision was not subjected to appeal.

B. In their statement of the questions presented, Appellants restate the issue eight separate ways, all of which excluding certain assumptions of fact, can be summarized as the question of whether or not the Order of the Court permitting multi-member districts in consonance with the state constitutional provision relating to such districts would constitute invidious discrimination under the United States Constitution.

C. It would further appear that Appellants further restate the issues involved in the appeal in Paragraphs (i), (ii) and (iii), Section 1 (f), Page 19 of the Jurisdictional Statement, wherein three additional questions are raised, being:

1. Refusal to consider evidence on the question of discrimination.
2. Failure to consider apportionment of the House of Representatives.
3. Geographical and economical factors were not considered which would require subdistricting for constitutional apportionment.

IV.

STATEMENT OF THE FACTS

This litigation has been long, difficult and expensive for the volunteer Plaintiffs, Appellees herein, and it is proper and just that an end should come. The facts material to the present appeal on the issues submitted are simple. Intervenors, Appellants herein are residents of Laramie County. Since all evidence was received at a pre-trial hearing, all material facts can be found from the documents offered at that hearing.

Actually two affidavits of facts of significance were filed, one by Intervenors, Appellants herein, of Keith F. Marsh, which is reproduced in the Jurisdictional Statement and a second in the form of a rebuttal affidavit introduced by Appellees at the pre-trial session, (Plaintiff's Exhibit No. 13). The consolidated substance of both affidavits is to demonstrate that during the past decade the political successes of one political party have substantially improved in legislative elections in Laramie County, where previously the other political party had maintained predominance. However, the latter party generally continues to maintain predominance in many other county elective positions to date.

V.

ARGUMENT

It would appear that the presentation involved in this appeal should properly be divided into two parts.

The first question is whether a multi-member representative district is constitutionally prohibited by the United States Constitution. If this determination is to be made by the United States Supreme Court, further argument is not required and the instant case is an appropriate medium by which, in a memorandum decision the United States Supreme Court might properly vacate the multi-member districting presently existant in Wyoming and coincidentally, also most other state legislatures.

It is submitted that this contention was specifically and categorically decided, contrary to Appellant's position in *Fortson vs Dorsey*, 379 U.S. 433, 13 L.ed. 2d 401, 85 S.Ct. 498 (1965), and certainly by implication considered in *Lucas vs Forty-fourth Assembly*, 379 U.S. 693, 13 L.ed. 2d 699, 85 S.Ct. 715 (1965) and *Scranton vs Drew*, 379 U.S. 40, 13 L.ed. 2d 107, 85 S.Ct. 207 (1964).

Having decided that the Court is not constitutionally *required* to prohibit multi-member districts the issue then

may be further redefined as to whether or not the Court *may* prohibit multi-member districts in opposition to districting provisions of the state constitution. This is specifically the issue decided in *Lucas*, supra. The teaching of all three cases noted above seems clear in effect that multi-member legislative districts permitted by state constitutions are not prohibited by the United States Constitution in absence of clear proof of invidious discrimination directly resulting from the districts as established.

Article 3, Section 3, Wyoming State Constitution, Legislative Apportionment provides:

> Each county shall constitute a senatorial and representative district; the senate and house of representatives shall be composed of members elected by the legal voters of the counties respectively every two (2) years. They shall be apportioned among the said counties as nearly as may be according to the number of their inhabitants. Each county shall have at least one senator and one representative; but at no time shall the number of members of the house of representatives be less than twice nor greater than three times the number of members of the senate.

The decision of the United States District Court invalidated the provision of this Article requiring at least one senator for each county. Appellants contend that the Court was not only permitted but also required to invalidate the rest of the Article, wherein it is provided that the County is the electoral district. As noted by exhibits previously introduced, particularly Plaintiff's original exhibits, introduced January 3, 1964, Wyoming since statehood has had a history of multi-member districts, including the Laramie County apportionment by the Session Laws of 1907 of four senators and ten representatives, (see Plaintiff's original Exhibit No. 4).

The second general sphere of question involves evidentiary proof in the proceedings of discrimination resulting from the multi-member districting for Laramie County.

Contrary to the intimation of Section 1 (F) (i), Page 19 of Appellant's Jurisdictional Statement, the District Court accepted for consideration all evidence offered and the only real facts presented which by the widest construction might be relevant and material, would be the affidavit of Keith F. Marsh, wherein it was apparently intended to show that discrimination is proved by virtue of the restricted area of residency of elected legislators in a multi-member district. The affidavit could hardly constitute even a scintilla of relevant evidence when considered in consonance with the Whitehead affidavit, which was introduced to broaden the scope of discussion to include more electoral offices in the county and to extend the number of electors in order to give a balanced result.

Note should also be taken that the issues adduced at Page 19 of the Jurisdictional Statement were not included in the notice of appeal as required by Rule 10 unless constituting a further restatement of the earlier contended eight issues.

Appellants apparently summarize the issue at hand, at Page 18 of their statement, wherein they say:

> "In Wyoming the voters in certain areas will continue to have their votes reflected in the legislature much the same manner as existed prior to reapportionment. These are the areas where county units were maintained as voting districts. On the other hand, voters in many areas will have their senators and representatives chosen on an entirely different basis and will have their votes cancelled and submerged by dominate political subdivisions."

What Appellants are saying is, and as even the most naive must recognize, that reapportionment litigation involves dominancy of political power and whether or not a majority of voters select a majority of the representatives. Since the rule has now been established by unquestioned law, those that have long supported the minority control through malapportionment are adamantly fighting for a

one-member district absolute requirement with the hope that somehow the moderation of the majority control can therein be obtained. Gerrymandering is not an unconsidered element in this vital fight.

Appellees herein do not necessarily oppose a general policy of smaller legislative districts or even one-member districts. It is the position of Appellees, in concurrence with what is believed to have been established and determind by decisions of the United States Supreme Court, that the question of the size of legislative districts, within reason, is a province of state law. The rule is submitted that the Federal Court is not *required* to invalidate state provisions permitting multi-member districts and secondly, an issue not herein found to be involved, that the Federal Court is not *permitted* to invalidate state constitutional provisions permitting multi-member districts in the absence of specific evidence that the multi-member districts were constituted and utilized for the purpose of practicing discrimination against a segment of the voting society.

VI.

CONCLUSION

It is respectfully submitted that the appeal should be denied and pursuant to Rule 16, Rules of the Supreme Court, the decision of the District Court affirmed.

Respectfully submitted,

A. G. McCLINTOCK
WALTER C. URBIGKIT, JR.
304 West 20th Street
Cheyenne, Wyoming

Attorneys for Appellees